Supreme Court, U.S.
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No. 01-1023

In The

Supreme Court of the United States

SCOTT ZAHN,

Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

On Petition For Writ Of Certiorari To The Michigan Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court re-evaluate the warrant requirement of the Fourth Amendment.

2. Whether Petitioner's Fourteenth Amendment due process rights were violated when the State of Michigan took jurisdiction based on criminal acts committed in Michigan even though Petitioner never physically entered Michigan.

3. Whether law enforcement agents "created" jurisdiction in Michigan in violation of Petitioner's Fourteenth Amendment due process rights.

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STATEMENT OF THE CASE

Our esteemed brother counsel, Mr. O'Rourke, fairly states the facts of the case. During the course of an investigation conducted by the Flint Area Narcotics Group (FANG), James Hall was enlisted to work as a police agent. Hall had been in the drug trafficking business in Michigan prior to cooperating with FANG. He had known Petitioner for several years. Petitioner served as his drug supplier. Petitioner had been shipping drugs to Michigan for several years. Consistent with their established past practice, Hall and Petitioner used the same "code words," method of contact, payment and shipment as employed in the instant case.

On February 18, 1997, Hall, in Michigan, telephoned Petitioner, in Florida, in order to purchase cocaine. Hall asked if they could "do lunch," code words indicating Hall wanted to buy cocaine. Down payment of $3,000 was requested and sent. A second phone call solidified delivery details. Cocaine was sent from Petitioner, in Florida, addressed to Jane Hoelzer, a pseudonym the two men agreed upon to facilitate their transactions, at 2220 East Court, Apartment 2, Flint, Michigan. A third Florida-to-Michigan phone call confirmed receipt of the down payment. Shipment of the cocaine was scheduled for next day delivery by noon.

FANG Sergeant Allan McLeod was surveilling 2220 East Court the next day when a Federal Express delivery person approached with a package. Armed with knowledge of all the above, McLeod, without first obtaining a

search warrant, seized and searched the package and found the cocaine Hall had ordered.

ARGUMENT

I. This Court should grant Petitioner's writ of *certiorari* limited to re-evaluating the warrant requirement of the Fourth Amendment.

This Honorable Court should grant Petitioner's writ of *certiorari* in order to right the wayward course of Fourth Amendment jurisprudence. Thomas Jefferson expressed his desire that our nation have a Bill of Rights clear to the average citizen "without the aid of sophisms."[1] Instead, despite an original intent clear in historical context and unambiguous language, this Court reduced the Fourth Amendment to a linguistic riddle and prompted legal writers to observe that this Court "simply has made a mess of search and seizure law"[2] and even sharper criticisim: "The Fourth Amendment today is an embarrassment."[3] Petitioner's writ is an appropriate vehicle to drive the Fourth Amendment down its intended road of reasonableness and grant Mr. Jefferson's wish.

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[1] Jefferson, Thomas, *Writings*, The Library of America (1984), p. 915.

[2] Wassertstrom and Seidman, *The Fourth Amendment as Constitutional Theory*, 77 Geo. L. J. 19, 20 (1988).

[3] Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757 (1994).

The original intent of the drafters of the Fourth Amendment is clear from history. The framers wanted simply to prohibit the use of general warrants. A framing-era general warrant was based on unparticularized suspicion of criminal activity, a general belief that laws (usually customs laws) were being violated. General warrants directed the arrest of "suspected persons" or a search of "suspicious places."[4]

History reveals no evidence of an intent to require police officers to obtain a warrant before conducting a reasonable search. Many factors support this historical perspective. The common law of the framing era, for example, permitted warrantless arrests and searches.[5] No warrant was required to search ships pursuant to some statutes.[6] In Colonial America, prior to adoption of the Fourth Amendment,

> [m]ost jurisdictions instituted general searches to collect taxes . . . capture felons, or find stolen merchandise. . . . Conversely, although specific warrants existed in legal manuals, they were rare before 1750, thereby indicating that they were not the intended constitutional successor to the general warrant.[7]

"Reasonable" searches were the intended successor to the general warrant. Even practical historical considerations

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[4] Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 558 n. 12.

[5] *Id.* at 576.

[6] *Id.* at 570.

[7] *Encyclopedia of the American Constitution*, 2d ed. (2000) p. 1098.

such as locating a magistrate in order to issue a warrant prior to conducting a search argue for the proposition.

The Fourth Amendment text likewise conveys no intent to require a warrant before conducting a reasonable search or seizure. The Fourth Amendment consists of two independent clauses. Distilled to its essence the Fourth Amendment states that searches and seizures must be reasonable and general warrants forbidden. On its face, the Fourth Amendment does not require issuance of a warrant prior to conducting a reasonable search or seizure.

Only arbitrary reasoning and creative interpretations of framing-era history continue to support this Court's current application of the Fourth Amendment. Consider, in *Harris v. United States*, 331 U.S. 145, 155 (1947), this Court held that "we should not permit our knowledge that abuses sometimes occur to give sinister coloration to procedures which are basically reasonable." *Harris* concluded that a five-hour search of a four-room apartment, incident to arrest, was reasonable and, therefore, not in violation of the Fourth Amendment. Thirteen months later, this Court held that no warrant was required to arrest a man federal agents observed operating an illegal still, but curiously a search warrant was required to seize the still. *Trupiano v. United States*, 334 U.S. 699, 705 (1948). With no reference to historical authority, *Trupiano* declared that:

> [t]o provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial process wherever possible.

Id. Later that same year, this Court continued its revision of framing-era history, holding that a "search without a warrant demands exceptional circumstances." *McDonald v. United States,* 335 U.S. 451, 454 (1948). This Court emphasized that:

> [a]bsent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. . . . The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.

Id. at 455-56. A curious conclusion considering fifty years or more would pass from adoption of the Fourth Amendment until the formation of the modern police force.[8]

Two years later, the fog lifted and this Court had clear historical vision, stating that: "it was recognized by the framers of the Constitution that there were reasonable searches for which no warrant was required." *United States v. Rabinowitz,* 339 U.S. 56, 60 (1950). *Rabinowitz* approved of an hour-and-a-half search of a desk, safe, and file cabinets incident to lawful arrest. *Id.* at 59. A similar reading of the Fourth Amendment was voiced in *Elkin v. United States,* 364 U.S. 206, 222 (1960), where this Court observed that "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures."

Cognizant of its self-inflicted lack of integrity in the area of Fourth Amendment law, *Chimel v. California,* 395 U.S. 752 (1969), acknowledged that:

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[8] Friedman, *A History of American Law,* 2d ed. (1985) p. 287.

> [t]he decisions of this Court bearing upon [the Fourth Amendment] have been far from consistent, as even the most cursory review makes evident.

Id. at 755. And instead of correcting the recognized inconsistency and relying on framing-era history and the unambiguous language of the Fourth Amendment, *Chimel* held that "searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant." *Id.* Respondent submits *Chimel*, at best, is an example of what Justice Cardozo observed years earlier: that a court sometimes must stand firmly "by the errors of our brethren of the week before, whether [it relished] them or not."[9]

Despite this rainbow of precedent, or perhaps because of it, this Court should grant Petitioner's writ of *certiorari* in order to establish that reasonable searches or seizures, conducted without a warrant are not a per se violation of the Fourth Amendment. Where, as here, a police officer is armed with knowledge approaching near certainty that contraband drugs will be uncovered in a package, a search should be permissible simply because it is reasonable. This Court has approved warrantless searches, in part, based on an officer's ability to smell marijuana. *United States v. Jones*, 469 U.S. 478, 482 (1985). And this Court impliedly approved a warrantless seizure of luggage based on a dog signaling drugs have been detected in luggage. *United States v. Place*, 462 U.S. 696, 699 (1983). Surely, Sgt. McLeod's evidence had more bite than a dog's bark.

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[9] Cardozo, *The Nature of the Judicial Process* (1921) p. 150.

The numerous exceptions this Court has created to justify its general rule that a warrant is required prior to conducting a search is itself evidence of the questionable viability of the general rule. For example, detaining and searching a suspect based only on "reasonable suspicion" requires no warrant. *Terry v. Ohio*, 392 U.S. 1 (1968). No warrant is required to search garbage placed outside the curtilage of a private home. *California v. Greenwood*, 486 U.S. 35 (1988). No warrant is required when probable cause exists to believe a car contains contraband. *Carroll v. United States*, 267 U.S. 132 (1925). No warrant is required to search containers within a car when probable cause exists to believe contraband is in the container. *Ross v. United States*, 456 U.S. 798, 800 (1982); *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999). And no warrant is required when consent to search is granted. *Schneckloth v. Bustamante*, 412 U.S. 218, 219 (1973). Petitioner relies on *United States v. Van Leeuwen*, 397 U.S. 249, 253 (1970), but even there this Court held it was reasonable to seize first-class mail for 29 hours without a warrant based solely on a government agent's *suspicion* that first-class mail contained contraband coins. This Court created over twenty exceptions to the warrant requirement.[10] The anticipated federalization of airport security may well necessitate the broadest exception to date. It is time for the exceptions to swallow the ill-conceived rule.

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[10] Exceptions to the warrant requirement are collected in Buffaloe, *"Special Needs" and the Fourth Amendment: An Exception Poised To Swallow the Warrant Preference Rule*, 32 Har. C.R.-C.L.L. Rev. 529, 530 n. 10 (1997).

Petitioner's writ of *certiorari* raises fundamental Fourth Amendment issues. Particularly since the events of September 11, 2001, this nation is prepared to embrace the wisdom of the clear and unambiguous standard the framers intended for our mutual welfare and safety. As Cardozo taught, "[t]he final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence."[11] The jurisprudential and public policy implications are of the highest order and consistent with this Court's Rule 10(c). Petitioner's writ of *certiorari* should be granted, limited to the question of re-evaluating the warrant requirement of the Fourth Amendment.

II. Petitioner's Fourteenth Amendment due process rights were not violated when the State of Michigan took jurisdiction based on criminal acts committed in Michigan even though Petitioner never physically entered Michigan.

Respondent strongly disputes Petitioner's assertion that as a result of Petitioner's actions no "detrimental effect" occurred in Michigan. Delivery of fifty grams of cocaine into Michigan is, in and of itself, a "detrimental effect" in Michigan and Michigan "has a compelling interest in detecting those who would traffic in deadly drugs for personal profit." *United States v. Mendenhall*, 446 U.S. 544, 561.

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[11] Cardozo, *id.* at 66.

It is undisputed that Petitioner telephoned Michigan and arranged for the delivery of fifty grams of cocaine to Michigan. It is a settled rule that:

> [a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect. . . .

Strassheim v. Daily, 221 U.S. 280, 285 (1911). *Strassheim* held that a state properly obtained jurisdiction, where a crime had sufficient and direct repercussions within the state, even though defendant never entered the state.

The rule of *Strassheim* is still good law. For example, the Ninth Circuit recently held that federal jurisdiction was proper when the crime, or part of the crime, occurred within the United States. Defendant, a citizen and resident of Italy, was convicted of mailing child pornography from Italy to an undercover officer in the United States. Defendant's

> mailing of child pornography was a continuing offense, so that part of the offense was committed in the United States as his letters traveled through the mail and were delivered to their destination, and [the Ninth Circuit] reject[ed defendant's] . . . argument that the crime was complete at the time the letter was deposited in the mail in Italy.

United States v. Moncini, 882 F.2d 401, 403 (9th Cir. 1989). The Eleventh Circuit held that when an individual's criminal acts directly violate the peace, tranquility and laws of a state, the state may prosecute that individual. *Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991). The Third Circuit has

expanded the reach of federal jurisdiction in the area of drug smuggling. The requirement that an act be done in the United States is not a necessity.

> The purpose of these provisions is to halt smugglers before they introduce their dangerous wares into and distribute them in this country. A jurisdictional requirement that an effect occur in the United States contravenes this purpose. . . .

United States v. Wright-Baker, 784 F.2d 161, 168 (3rd Cir. 1986). Petitioner's act of delivering cocaine into Michigan had a detrimental effect in Michigan. Jurisdiction to prosecute in Michigan was proper and did not violate his Fourteenth Amendment rights.

III. Law enforcement agents did not "create" jurisdiction in Michigan in violation of Petitioner's Fourteenth Amendment due process rights.

Petitioner's conviction stems from his delivery of over fifty grams of cocaine into Michigan. Petitioner argues state agents contrived to manufacture Michigan jurisdiction and supports his argument with citation to federal authority that holds acts of a government agent performed *solely* for the purpose of creating a connection to interstate commerce cannot give rise to federal jurisdiction. Each of these cases is significantly distinct from the present matter.

The cases upon which Petitioner relies deal with whether the crimes had a sufficient nexus to interstate commerce to provide federal jurisdiction. Only where the interstate aspect of defendant's criminal conduct was created by a law enforcement agent *solely* for the purpose of

obtaining jurisdiction have courts held jurisdiction was contrived and therefore improper. *United States v. Coates*, 949 F.2d 104, 106 (4th Cir. 1991); *see also United States v. Brantley*, 777 F.2d 159, 161-63 (4th Cir. 1985) (unnecessary movement of equipment and alcohol through interstate commerce by government agents to create gambling club where defendants' illegal activity occurred wholly within South Carolina); *United States v. Archer*, 486 F.2d 670, 681-82 (2nd Cir. 1973) (unnecessary interstate telephone call placed by government agent). In *United States v. Garrett*, 716 F.2d 257 (5th Cir. 1983), federal agents had a pre-existing out-of-state presence in California and defendant telephoned the agents from Texas seeking money as part of his illegal operations there. Even though the only connection to California was the government agents' presence, the Fifth Circuit held that the interstate commerce element of defendant's criminal conduct "was not *solely* furnished by government agents [to obtain jurisdiction] and . . . the government did not attempt to contrive jurisdiction." *Id.* at 267.

In the present matter, police officers took no action solely for the purpose of creating jurisdiction in Michigan. To the contrary, Petitioner's ongoing criminal enterprise of delivering cocaine to Hall in Michigan created jurisdiction. Hall contacted Petitioner in his usual manner, placing another order to buy cocaine. Petitioner purposefully made telephone calls to Michigan to arrange delivery and request payment. Petitioner delivered over fifty grams of cocaine to Michigan through an overnight delivery courier.

Significantly, law enforcement authorities created no artificial contacts with Michigan in order to obtain jurisdiction over Petitioner's criminal activity. No state agent traveled out of Michigan to seek to draw Petitioner's criminal activity into the state, nor did anyone contrive a contact that did not already exist. Petitioner merely continued his drug trafficking activity into Michigan and was caught. Petitioner's suggestion that the state somehow manufactured jurisdiction over Petitioner's illegal act is unsupported in law or the record. Michigan has jurisdiction to enforce its criminal laws against such criminal invasions.

Respectfully submitted,

Dated: February 7, 2002

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